

received, the three persons were charged with assaulting a police officer and were reportedly sentenced two days later to two years imprisonment. Although I have no details of the trial proceedings, it would appear that the accused could not possibly mount an effective defense with regard to the legal and factual basis for the arrest and incarceration in such a short period of time.

c. Cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR) is continuing and more than 190,000 Myanmar refugees out of estimated total of about 250,000 have so far been repatriated from neighbouring Bangladesh.

d. The Government is expanding cooperation with various other United Nations bodies and specialised agencies such as UNDP, UNICEF and UNDCP. Year after year, the work of the humanitarian non-governmental organizations is slowly expanding. Now, these organisations are allowed to implement programmes outside Yangon and able to reach out grass-root people who suffer from shortage or lack of food, safe water, medicine, medical care and proper education.

e. In cities like Yangon, Myitkyina and Kyaningtone, I observed that there were visible signs of relaxation of tension in the life of the people. It seems that people generally enjoy normal life. There were many consumer goods in market places where many shoppers crowded. Physical developments in the construction or improvement of roads, bridges, buildings and railways are taking place throughout the country and in some border areas. However, just as last year, I was informed that only a small portion of the population enjoy the improved life and the majority who were poor rather suffered from higher prices of basic necessity goods such as rice and medicine.

f. On the particular question of forced labour, I was informed during my recent mission to Myanmar that the SLORC had issued a "secret directive" to discourage the practice of forced labour. I am hopeful that this directive would be implemented rigorously.

g. As Special Rapporteur, I welcome the signature of several cease-fire agreements between the Government of Myanmar and different ethnic minorities. This is without doubt a positive step towards peace. Needless to say, such agreements should be faithfully respected by both parties.

Mr. President, in spite of these developments, I have the duty to state that there are still many restrictions on fundamental freedoms and serious violations of human rights continuing in Myanmar.

a. As mentioned above, I welcome the recent release of a number of political prisoners. However, I remain concerned about the fact that there are still more than several hundred persons imprisoned or detained for reasons of political activities. I am also concerned about the prevalence of a complex array of security laws which allow the Government sweeping powers of arbitrary arrest and detention. These laws include the 1950 Emergency Provisions Act, the 1975 State Protection Law, the 1962 Printers and Publishers Registration Law, the 1923 Official Secrets Act and the 1908 Unlawful Association Act.

Various articles in these laws continue to be used in combination to prosecute a number of individuals who were exercising their rights to freedom of expression and association. The combination of charges under these laws included ones such as writing and distributing what were described as "illegal leaflets, spreading false information injurious to the state" and "contact with illegal organisations". I understand that due to such laws and other SLORC orders, the activities of the political parties, particularly the NLD, are severely restricted.

b. Severe court sentences for some political leaders have been reported and confirmed. Information from reliable sources indicates that there are problems in the field of the administration of justice with regard to fair trials, free access to defense lawyers, proportionality between the acts committed and the punishment applied and time for careful examination of the case by courts.

c. The non-acceptance by Myanmar of ICRC's customary procedures for visits for places of detention is a negative step towards amelioration of their conditions.

d. There are still cases of torture, arbitrary killings, rapes, and confiscation of private property according to testimony and evidence acquired by me. They seem to be taking place most frequently in border areas by military soldiers in the course of military operations, forced relocations and development projects. Many of the victims of such atrocious acts belong to ethnic national populations, especially women, peasants, daily wage earners and other peaceful civilians who do not have enough money to avoid mistreatment by bribing.

e. I am gravely concerned at the continued reports of forced portering, forced labour, forced relocation which are still occurring in border areas where the Army is engaged in military operations or where "regional development projects" are taking place.

PRELIMINARY RECOMMENDATIONS

a. As Special Rapporteur, I urge the Government of Myanmar to sign and ratify the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the Optional Protocol to the Covenant on Civil and Political Rights, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Discrimination against Women.

b. The Government of Myanmar should comply with the obligations under the International Labour Organization (ILO) Convention No. 29 prohibiting the practice of forced portering and other forced labour.

c. Myanmar law should be brought into line with accepted international standards regarding protection of the physical integrity rights. Among these international standards are the right to life, prohibition of torture, providing humane conditions for all persons under detention and insurance of the minimum standards of judicial guarantees.

d. The Government of Myanmar should take steps to facilitate and guarantee enjoyment of the freedoms of opinions, expression and association, in particular by decriminalizing the expression of oppositional views, relinquishing government control over the media and literary and artistic community, and permitting the formation of independently organized trade unions.

e. All persons including elected political representatives, students, workers, peasants, monks and others arrested or detained under martial law after the 1988 and 1990 demonstrations or as a result of the National Convention, should be tried by a properly constituted and independent civilian court in an open and internationally accessible judicial process. If found guilty in such judicial proceedings, they should be given a just sentence; alternatively, they should be immediately released and the Government refrain from all acts of intimidation, threats or reprisals against them or their families.

f. As Special Rapporteur, I recommend the Government of Myanmar to repeal or amend as appropriate the relevant provisions which at present prevent the ICRC from carrying out its humanitarian activities as regards the prison visits. In this regard, I encourage the Government of Myanmar, in a spirit of humanitarian goodwill, to re-invite the pres-

ence in Myanmar of the International Committee of the Red Cross in order to carry out their purely humanitarian tasks.

g. The Government of Myanmar should publicize the "secret directive" which discourage the practice of forced labour. This will indicate the will of the Government of Myanmar to effectively prohibit and suppress forced labour. Moreover, wide dissemination of the existence of the directive would promote awareness that forced labour is neither condoned nor tolerated.

h. The Government of Myanmar should without delay resume its dialogue with Daw Aung San Suu Kyi.

i. As Special Rapporteur, I call upon the Government of Myanmar to resolve peacefully its difficulties with ethnic minorities and to take all appropriate measures to ensure respect for human rights and humanitarian obligations in the situation of armed conflicts between the Myanmar Army and the armed ethnic groups.

j. The Government of Myanmar should distribute copies of the Universal Declaration of Human Rights in Myanmar language to all delegates to National Convention which is to be reconvened tomorrow, 28 November 1995. Such action would indicate to the international community the willingness of the Government to bring the relevant provisions of the domestic laws, in particular the new Constitution to be eventually enacted into conformity with international human rights standards.

Mr. President, I have analyzed these allegations and have made some recommendations strictly in terms of the international human rights obligations which Myanmar has freely undertaken. I am particularly thinking of the fact that Myanmar is a Member of the United Nations and is therefore bound to respect the human rights standards emanating from the United Nations Charter. I believe the Government of Myanmar should, and has the ability, to fulfill in good faith the obligations it has assumed.

FLAG DESECRATION CONSTITUTIONAL AMENDMENT

The Senate continued with the consideration of the joint resolution.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, I come to the floor to speak on Senate Joint Resolution 31, the proposed resolution that would present to the States the opportunity to amend the U.S. Constitution for the 20th time. It is a very straightforward, simple proposal that I believe is not necessary and would, indeed, create an environment that would produce, potentially, the opposite of that which we seek to produce, or at least, as I hear, proponents of this amendment are seeking to produce—and that is, that our people have at least one symbol that they respect, that we have a unifying symbol, which is our flag, and that the flag creates, as a consequence of our reverence for it, a sense of national purpose, at least in that one instance.

This proposal, Mr. President, I believe, is well intended in that regard. If I were to identify the thing that troubles me the most about our country today, it is the question of whether or not we are developing the kind of personal character that is needed for the

Nation to have the courage and the strength to respond to whatever may happen to us in the future. That kind of individual character development requires a considerable amount of effort and attention not just on the part of young people who are working to acquire it, but adults who are working to try to help them. I note, in particular, that this proposal is a top priority of the American Legion and Veterans of Foreign Wars and the several other service organizations. In both the VFW and American Legion's cases, they have as a top priority as well working with young people to help them acquire the capacity to be good citizens, to respect their country, to respect their flag, to respect their role in a free and independent nation and the requirements that fall to us as individuals in a free and independent nation.

The loss of respect for not just the flag but for many other things in our country today troubles not just members of the Legion but troubles almost anybody who is an observer of American life today.

I know a couple of days ago, Senator LIEBERMAN and Senator NUNN, along with former Secretary of Education Bill Bennett, made a public presentation of proposals to try to deal with the deterioration in the quality of presentations made on daytime broadcast television.

I listened a couple weeks ago to Senator NUNN on the floor go through some things being broadcast on daytime television, and I had a feeling I was on a different planet. Most of us in this body probably do not watch much daytime television, and it was shocking to hear the sorts of things that were being not just discussed, but offered as being OK, offered as being acceptable, offered as being sort of a legitimate kind of behavior.

This deterioration in the quality of our character is a great concern. I see it as a principal motivator behind what I consider, as I said, to be a well-intended proposal.

Mr. President, one of the things I think citizens should understand as we consider this constitutional amendment is that our flag is already protected. You cannot burn or desecrate our flag. If it is a flag that I own personally, you cannot desecrate my flag. You certainly cannot desecrate a flag that you and I own. That is our flag. A flag flying over Iwo Jima, the flag that flies at half-mast today around the Washington Memorial, flags at cemeteries, flags that we own. That is our flag. You cannot desecrate that. It is a violation of current law to desecrate in any fashion, to approach in any fashion that would be desecration of our flag under current law.

What this legislation proposes to do is say not only are we going to protect our flag, we are going to protect somebody else's flag from us.

If an individual in their home, for example, has a flag in their home and a law is passed, say, in the State of Ne-

braska, as I think it probably would be, saying that desecration of a flag is a violation of the law, someone could call up and report and say, "Gee, I saw my neighbor do something with the flag in their home and I think it is a violation of law. I think what they were doing with their flag in the home is a violation of the law, and I think you should investigate and make sure they are not desecrating their own flag inside of their home."

Mr. President, I genuinely believe this is going to set off and create the very sort of division and the very sort of problem that we seek to avoid.

I think it is, again, a well-intended constitutional amendment, but I for one do not look forward to an opportunity where the people of this country are debating at the local level whether or not it is a desecration of our flag to have someone sewing the flag on their pants. It may end up being if you are driving down the highway going from, say, California to Florida, it may be legal to have a pair of pants with a flag on it in California; it may be illegal in Texas or Mississippi or vice versa.

One may have to get from AAA information about what the various flag ordinances are from State to State. I think that will, rather than causing us to deepen our respect for the flag and using it as a symbol to inspire us—not just us as adults but to help us inspire our young people to consider the sacrifices that have been made under that rather glorious symbol—rather than inspiring us, it is apt to cause us to deteriorate into an argument that, frankly, I view as something that will produce a negative, not a constructive, result.

This constitutional amendment does not protect our flag. Our flag is already protected. What this does is say it will extend the protection of our flag to the protection of somebody else's flag that they have in their home in any way, shape or form. It will set off a debate about whether or not the Government has the right to come in, and if it is somebody else's property, take action to protect all of us or what they might be doing with their flag.

The next thing I say, Mr. President, if the flag was not revered, as it clearly is, if it did not set off such a strong emotional reaction, I think a majority of Americans who have experienced in some fashion people giving of themselves—if not giving of their lives—as a consequence of being inspired by that flag, if it was not already revered, if there really was a threat to our flag, you would see a substantial amount of instances out there where people were, as a part of expressing their anger with their country or as part of expressing their anger with something that their Congress is doing or that their Government has done to then, they would be setting the flags on fire. They are not.

The reason they are not is that they know there is a taboo that you are breaking, that you are violating something holy, and if you are trying to

score a point, if you are trying to persuade somebody of your point of view, the last thing you want to do is to take a flag that belongs to you and desecrate it in any fashion, or let it traipse along the ground, trample it in any way, disrespect the flag at all.

Mr. President, again, I know if the answer is no to this constitutional amendment, that Members are going to have to explain to citizens at home or to organizations at home, why are you not simply allowing us to express the will of the people? Why do you not just let the Constitution be amended?

The clearest answer I can give is that I genuinely believe that this constitutional amendment will produce less respect for the flag, not more respect for the flag. It will make the flag an object of political controversy. We ought to use the flag to educate our young people, rather than telling them that they have to respect the flag at birth without explaining why, without talking to them and giving them the evidence that many of us as adults already have that causes us to tear up and feel emotional around the flag, rather than taking the time and saying: This is what the cold war was. This is what we did in World War I. There were 50 million people under arms in World War I, and 8 million men died in World War I. This is what happened in World War II. This is what men and women of this country did in the Second World War. This is what our fighting people did, as well, in Korea, to stop the Communists from coming down from the North. This is what we did in Vietnam.

Even as controversial and as difficult as it was, there was a movement, a desire to give the people of Vietnam freedom. Did it come off the tracks? Was it loused up? Yes. But people like myself who volunteered, who served, did so because we believed in freedom. That is what the flag does stand for. We should not require somebody to respect it by passing a law saying, If you violate the law, we will punish you. We should bring them into our presence and say: Understand what character is all about. You do not have character if your behavior is willful. You have character if your behavior is obedient—obedient to your parents, obedient to your church, to your synagogue, obedient to your country. That is what character requires us to do.

If we simply pass a law and say you have to respect the flag, in my judgment, what we are going to do is turn the flag into a political instrument. We are going to diminish its value. We should use it as an object lesson when we are debating the budget, for example, when we are debating anything that requires us to put ourselves on the line, to take risks, to take a chance for freedom, to take a chance for someone else, to say: Rather than just taking care of myself, I am going to take care of somebody else.

The description of the young people—and they were all in their late teens and early twenties, several hundred

thousand men who landed on the beaches of Normandy 51 years ago—if you hear that story, and I had the chance last year to hear it told in detail by men now in their seventies who were on that landing, who went on that voyage, there was no guarantee. Indeed, many arguments were given that this thing was going to be a failure. People well informed, leaders with great knowledge believed that it would fail, that it would not be successful.

The sea conditions that day were rough. They got sick on the voyage to France, and they were terrified of the prospect of being killed by German artillery and German weapons. They knew that their lives could end the minute they stepped off of that landing craft. They knew that was a possibility.

That is what we should do when it comes to the flag. When it comes time for talking to our young people, teach them why they should respect the flag. The reason why is that these men who serve and women who serve our country today are saying, We are going to be obedient to this country. We are going to follow orders because we believe that there is a moral principle at stake here, and that principle is giving ourselves to someone else, sacrificing for someone else, paying attention, being considerate, being willing to do things that are good for somebody else, rather than simply trying to figure out how to stick it to them, how to make them look bad, how to make them feel bad as well.

The flag will not be a symbol that inspires us if we require respect, if we say to our young people: Now, we just amended our Constitution. Now we have a law on the books.

There was no law on the books in 1941 when this Nation was attacked by the Japanese at Pearl Harbor. We did not require that of Americans, and say: Under penalty of the police coming into your home, if you desecrate our flag we are somehow going to take action against you. We knew what it meant to be patriotic. We knew that this Nation's freedom was at risk and this world's freedom was at stake and responded as a consequence.

I have talked to many members of the Legion, the VFW, the DAV, the Vietnam veterans, American veterans, and many other veterans and citizens of Nebraska who say: Just let us amend our Constitution. Just let us pass a law. Let us do this. That is all we are asking, is for the opportunity to do it.

I have to say I am not just sympathetic with that view, I believe I understand it. I understand what they are trying to do. They are concerned about the loss of respect. They are concerned about the loss of respect, not just for the flag—where, in fact, it may be one of the icons left in America where there is automatic respect—but the loss of respect for parents, the loss of respect for our leaders, the loss of respect for institutions, the loss of respect for one another; the unwilling-

ness to be considerate, the unwillingness to be obedient, the deterioration in the value of serving someone else, of risking your life for someone else's freedom.

I understand and believe it is a great challenge for this country to try to build character one person at a time, to say that we are going to reach to our youth and inspire them with a narrative of this country, the stories of this country. The sacrifice that led us to where we are today should cause anyone who pays attention to the history of the United States of America to say that our flag deserves the reverence that this constitutional amendment is attempting to give it with the force of law.

It should be the force of our knowledge, the force of our conscience, the force of our willingness to give it back in kind that causes us to revere this flag, not the force of the police in our local community, not the force that we are afraid something bad is going to happen to us if we desecrate the U.S. flag.

I hope when it comes time to vote that at least 34 Members of this body will vote against this constitutional amendment, not because we believe that the flag should not be revered, not because we are not concerned for the loss of respect for it and other institutions in this country, but for precisely the opposite reason. I hope this debate does not lead us down the road to converting the flag into a political object, which I deeply believe it will if we amend our Constitution.

I hope we take some stock of ourselves, we read a recent assessment that was done about what our young people and our adults know about the history of this country, where we came from, how it was we got to where we are today. We see a daunting challenge ahead of us. Far too many Americans do not know how it is that we got to where we are today. Far too many Americans still believe that freedom is somehow free, that it is our birthright, and that we need do nothing to remain free. It is ours; we have a right to it; we can do whatever we want with it. We can act and behave in a willful fashion. We do not have to regard at all the feelings or lives not only of other people in our presence, but our future as well.

I know the challenge that this constitutional amendment presents to colleagues is a rather substantial one. You fear you are going to be accused of not being in favor of protecting our flag if you vote against it. I hope, as I said, 34 Members will at least stand on this floor sometime next week when it comes up and say that because we respect this flag of ours, because we believe that it should be revered, because we believe that Americans should make the choice, the personal choice based upon a personal and active knowledge of what this flag represents, that they will say we do not need a law to cause us to behave in the fashion

that we know is right. We do not need to amend our Constitution to get us to respect Old Glory.

UNANIMOUS-CONSENT AGREEMENT

Mr. MACK. Mr. President, I ask unanimous consent the following amendments be the only amendments in order to Senate Joint Resolution 31, and they must be offered and debated during Monday's session of the Senate: McConnell, relevant substitute; Hatch, two relevant amendments; Biden, relevant; Feinstein, relevant; Hollings, two relevant amendments.

I further ask that at 9 a.m. on Tuesday, December 12, there be 1 hour 40 minutes for closing debate, to be equally divided in the usual form, and the votes occur on or in relation to the amendments beginning at 2:17 p.m., with the first vote limited to the standard 15 minutes and all remaining stacked votes limited to 10 minutes in length, with 2 minutes for debate prior to the votes for explanation to be equally divided in the usual form.

I further ask unanimous consent that following the disposition of the amendments, the joint resolution be read for a third time and a final vote occur immediately without any intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MACK. In light of this agreement, there will be no rollcall votes during Monday's session of the Senate and any votes ordered with respect to amendments and the final vote will occur beginning at 2:17 p.m. on Tuesday, December 12, 1995.

Mr. SHELBY. Mr. President, I strongly support Senate Joint Resolution 31, which amends the Constitution to protect the flag of the United States from those who would desecrate it.

The American flag is a national symbol of the values this country was founded on. Many Americans have fought and died to defend these values and this country. It is an insult to these patriots, their relatives, and all other citizens who hold this country dear, to burn or desecrate the symbol of our nation and our freedom.

I certainly support the right of all citizens to freedom of speech, but that right has never been absolute in our country. That's why there are laws against libel, slander, perjury, and obscenity. Similarly, our freedom of political expression is also limited. No one can legally deface the Supreme Court building or the Washington Monument, no matter how much he or she might wish to protest a particular government policy or law. The American flag, as the symbol of all the great values this country stands for, deserves special protection under the Constitution. It simply is not necessary to commit an act of violence against this flag to register protest against the government. Passage of Senate Joint Resolution 31 will help ensure our national symbol receives the respect and protection it deserves.

Again, Mr. President, I offer my strong support for Senate Joint Resolution 31 and I urge my colleagues to support it as well.

Mr. COATS. Mr. President, today we consider a constitutional amendment which allows States to enact laws to protect the American flag. I am cosponsor of this amendment and I strongly believe that it is necessary to render this protection to the most important symbol of our Nation.

The debate about the flag began in 1989 when the Supreme Court curiously determined that it was perfectly legal to burn the American flag as a form of political speech. This ruling led to shock and outrage from all across the United States. Congress immediately took action, passing a statute setting penalties for anyone who physically desecrates the flag. The Supreme Court ruled again that the Federal statute was unconstitutional, violating the first amendment.

Unfortunately, the Senate failed to pass a constitutional amendment to protect the flag. Today, however, we are very near this goal, with 56 cosponsors to the amendment.

The amendment reads simply "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

I feel an overwhelming mixture of regret and thanks—which is the substance of patriotism—when I consider the sacrifice of so many for the sake of America. This pride is rooted in one solid and extraordinary fact—the selflessness of thousands of men and women who have given their lives to preserve American freedom.

I believe for the vast majority of Americans the flag intrinsically represents this pride. Americans do not blindly follow traditions. But we do care deeply about symbols—particularly that one symbol of ideas and values for which men and women have sacrificed and died in every generation. To desecrate the flag, I believe, is to desecrate the memory and make light of their sacrifice.

Justice Stevens writing in dissent to the 1989 Supreme Court decision said:

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissenters both at home and abroad who may have no interest at all in our national unity or survival.

There is a type of patriotism that is held so deeply that it finds expression in concrete things like a patriot's crippled body—or in bits of colored cloth. For men who have risked death in service of a flag it is more than just a symbol, it is sacrifice you can hold in your hand—or trample underfoot in contempt.

Men and women who we ask to die for a flag have a right to expect that flag to be respected by those who bene-

fit from their sacrifice. It is part of the compact we make with those who will serve. At the time of the Supreme Court decision, it was the law in 48 States. Since that time, 49 State legislatures have called for a constitutional amendment to prohibit physical desecration of the flag. No other amendment in our history has had the same degree of support in State legislatures.

Tolerance is an important thing in a free and diverse society. Agreement must never be a prerequisite for civility. But tolerance can never be rooted in the view that nothing is worth outrage because nothing is worth our sacrifice.

In Chief Justice Rehnquist's stinging dissent to the court decision, labeled flag burning as "conduct that is regarded as evil and offensive to the majority of people—in a category with—murder, embezzlement or pollution." The Court's ruling, he noted, "found that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The Government may conscript men into the Armed Forces where they must fight and die for the flag, but the Government may not prohibit the public burning of the banner under which they fight."

Yes, we must be tolerant but we must never adopt and enervating and cowardly disdain that strips us of patriotic conviction and dulls our ability to be offended by the desecration of vital symbols. "In the world it is called tolerance," wrote author Dorothy Sayers, "but in hell it is called despair *** the sin that believes in nothing, cares for nothing, enjoys nothing, finds purpose in nothing, lives for nothing, and remains alive because there is nothing for which it will die."

Mr. FORD. Mr. President, yesterday we marked the bombing of Pearl Harbor. Many of us can still remember the gripping of our hearts 54 years ago today, as the realization spread over us that nothing would ever again be quite the same. Yet, I think it is fair to say that there is already a whole generation of Americans who have no grasp of the meaning World War II has for so many of us. Young people who might never hear a parent or a grandparent tell of the time they felt their commitment to a way of life being tested, of a time they could finally close their eyes and rest, knowing an important fight had been won on the world stage.

But when those same young people turn their eyes toward this country's flag, I know they understand that in its fabric was woven the dramas of thousands of battles fought on the shores of foreign lands and over the lunch counters or Main Streets of our own home towns.

There are many good reasons for protecting the unique symbol of the American flag, from the basic liberties it represents to the promise of a better future it holds out. But some of the

greatest reasons for protecting the flag lie in its ability to bind one generation to the next in their love and respect for this country, so that even as the memories of yesterday's battles begin to fade, the importance of what they secured continues to hold fast in our hearts.

A flag that flies proudly in this country serves as a reminder of how war can change the course of a life, of a nation, of a world, so that even individuals who were never there, who might never have heard the stories, recognize that those hours of destruction and suffering have altered the future irrevocably, and that their own liberty was a hard won prize.

It follows then that a desecrated flag mocks the millions who have reached out or fought for all that our flag symbolizes, from the basic liberties written into our Constitution to the dreams of a better future for their families.

That's why I believe so strongly that the physical integrity of the American flag must be protected. Back in 1989, the U.S. Supreme Court declared unconstitutional a Texas flag desecration statute, ruling that flag desecration was free speech protected under the first amendment.

In response to that decision, the Senate overwhelmingly passed the Flag Protection Act, which was also declared unconstitutional. The Supreme Court's action made it clear that a constitutional amendment is necessary for enactment of any binding protection of the flag.

Up to this point, neither House of Congress has been able to garner the two-thirds super majority necessary for passage of a constitutional amendment. But because grassroots support for this amendment continues to grow, I've joined with Members on both sides of the aisle to again try passing this amendment. I'm hopeful that this time we'll get the necessary votes.

Clearly no legitimate act of political protest should be suppressed. Nor should we ever discourage debate and discussion about the federal government. The narrowly written amendment gives Congress and the States the "power to prohibit the physical desecration of the Flag of the United States," without jeopardizing those rights of free speech.

On July 14, 1861 a Union soldier wrote his last letter to his wife. He said:

My courage does not halt or falter. I know how American civilization now bears upon the triumph of the government and how great a debt we owe to those who went before us through the blood and suffering of the Revolution, and I am willing, perfectly willing, to lay down all my joys in this life to help maintain this government and pay that debt.

Today, our task here in the Senate seems trivial in comparison. But if we want the flag that hangs in school rooms, over courthouses, in sports stadiums and off front porches all across America, to continue symbolizing that same commitment to country, then it is a challenge we cannot fail to meet.

Mr. President, I urge my colleagues to join me in voting in favor of this important legislation.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WARNER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WARNER. Mr. President, I see present the distinguished Senator from Ohio on the floor, and I just wish to inform him that I will only be speaking for about 2 or 3 minutes.

Mr. President, I am a cosponsor of the flag protection constitutional amendment, and I am privileged to join my colleagues in cosponsoring this very important piece of legislation.

It is of tremendous interest to the constituents of the State of Virginia, and particularly those who are members of the American Legion and the VFW—both organizations I am privileged to be a member of—and other service organizations. I want to salute their contribution and support toward this legislation.

Today, as I move about the Halls of the U.S. Senate, I have had the opportunity to meet members of those service organizations who come here today to speak to Members and otherwise encourage the strongest support for this legislation. I salute them.

Those who have been privileged to wear the uniform of our country have a constant—what I call—trustee relationship to that flag, a very special trustee relationship.

I served briefly in World War II in the U.S. Navy, and then for a second period of active duty service in the U.S. Marines during the Korean war with a brief period of service in Korea. I have always looked upon those opportunities as a privilege. I would not be a U.S. Senator today had it not been for the training that I received both in the U.S. Navy and in the U.S. Marine Corps. I have always felt that my duty here as a U.S. Senator as one to pay back—particularly those young men and women now wearing the uniform of our country—all that I have received by way of not only education but the first lessons of what leadership means.

I served my country very humbly—never to be added to the columns of those who served with great valor. But I did volunteer twice to do my duty, as others saw fit.

That is all a part of what we are incorporating in the support of this resolution because those of us who served remember so well the many friends that marched with us, or flew with us, or sailed with us—whatever the case may be—who paid the ultimate price, many others who came back with loss of limb and still bear the scars of war.

So I wish to pay special recognition to all and to speak in a very humble

manner on their behalf and thank them for their contribution in making possible this legislation and what I hope will be the adoption by the Senate.

I yield the floor.

Mr. GLENN. Mr. President, to take up the issue before us on a constitutional amendment regarding the flag is a very difficult thing to do. The different expressions on the floor are certainly ones to consider whether people are for the amendment or against the amendment. It is very difficult because the feelings run so deep in both directions. I do not know whether there is anyone who is still on the fence with regard to their views on this matter.

Until today, I have not said a much about this. I talked about it in the Chamber several years ago when we had the issue before us. But I think people who have very deep feelings on this can have their feelings and we respect those feelings. I do not quarrel one iota with people on the other side of the aisle who have their feelings for whatever reason. But I do think there is a danger here. I think the danger is that the flag does not need the protection in this argument. What needs protection is really the Bill of Rights, from those who would look at it rather superficially from my view.

So until today, I have tended to hold my tongue and have kept my peace about this issue before us because it is no fun being attacked or being labeled as unpatriotic or a friend of flag burners. And I can assure you that I am neither simply because I have doubts about the wisdom of a constitutional flag burning amendment. I am not taking the floor to speak about this issue, as I say, because some of our feelings about the flag are difficult to discuss. Feelings run very deep and very strong. Let me make a few things very clear up front.

We all, of course, love the flag, and I would say nobody in this Chamber or this country loves our flag more than I do. We all can make that same statement on the floor. I fought hard for this flag through two wars and representing the country in the space program, and so on. I am both honored and proud that few people in this Nation have been able to take this flag where I took it, at least on the first space flight. That is the first thing I selected when I had a personal preference pack, as they called it, along on the trip. I took along little silk flags so I could give them to my children, and they remain among my children's most cherished possessions to this day.

I also know, more importantly, from my own personal experience that every last fiber, every stitch, every thread in that flag can be looked at as standing for someone who gave their life to defend it. At my age, I can tell you that I probably have more friends buried over in Arlington Cemetery bearing silent witness to our flag as I do bearing public witness to it in the world of the living. Maybe that is why I have so little patience and even less sympathy for

those pathetic and insensitive few who would demean and defile our Nation's greatest symbol of sacrifice, the flag of the United States of America.

Those are some of the reasons I have kept silent until now. It is now clear that a legislative alternative to amending our Constitution is probably not going to be possible before we have to vote on this. It is now equally clear that those of us who question the wisdom of watering down our Bill of Rights have no choice but to stand up to the political mud merchants in some respects, from some of the comments that have been made, and to speak out against those who would deal in demagoguery on this issue.

It is now clear that those of us who remember and care deeply about the sacrifices made on behalf of freedom have a special responsibility, and we do, to point out that it would be a hollow victory, indeed, if we preserved the symbol of our freedoms by chipping away at those freedoms themselves. That is the important choice here. Are we to protect the symbol at the expense of even taking a small chance at chipping away at the freedoms that that symbol represents?

On that score, let us be honest with each other and with the American people. The flag is this Nation's most powerful and emotional symbol, and it is. I have been here with Senator KERREY once in the Chamber when he said he thought in Nebraska they did not need this because if somebody started to burn a flag, they would take care of it themselves right then and there and on the spot. And I agree with that. Back home in Ohio, we have almost 11 million people, and I think there are very few, who, if they saw a flag being burned, would not be willing to take action against that person or persons. It is a gut feeling. I feel that same way myself, and I would join into that.

But we have to think a little longer score on this, it seems to me. So the flag is the Nation's most powerful and emotional symbol, and it is our sacred symbol. It is a revered symbol, but it is a symbol. It symbolizes the freedoms we have in this country, but it is not the freedoms themselves. And that is why this debate is not between those who love the flag on the one hand and those who do not on the other, no matter how often the demagogues try to tell us otherwise. Everyone on both sides of the aisle politically within this Chamber and everyone on both sides of this debate loves and respects the flag. The question is how best to honor it, to honor it and what it represents.

Those who made the ultimate sacrifice for our flag did not give up their lives for just a piece of cloth, albeit red, white, and blue, and it had some stars on it. Not just for the flag. They died because of their allegiance to this country, to the values and the rights and principles represented by that flag and to the Republic for which it stands.

Without a doubt, the most important of those values, the most important of

those values, rights and principles is individual liberty, the liberty to worship and think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority. And that is what is so unique about this country of ours—unique among all the nations around this world—Britain, France, you name them, any place where they have democracy, but ours is especially unique in that regard.

That commitment to freedom is encapsulated, it is encoded in our Bill of Rights, perhaps the most envied and imitated document anywhere in the world. The Bill of Rights is what makes our country unique. It is what has made us a shining beacon in a dark world, a shining beacon of hope and inspiration to oppressed peoples around the world for well over 200 years. It is, in short, what makes America America.

You may look back a little bit. You know, the Bill of Rights came into being because the States at that time were not going to approve the Constitution unless we had some of these additional protections included. And so those additional protections that were to be included became known as the Bill of Rights. They are the first series of amendments to the Constitution. Those States were only prepared to accept the Constitution with the understanding that these additional protections for each individual and each individual's rights were incorporated in that Constitution.

That is how the Bill of Rights came to be. The very first item in that Bill of Rights, the first amendment in it to our Constitution has never been changed or altered even one single time. In all of American history, over 7,000 attempts have been made to put amendments through. Just 27 have gotten through, and there was not a single time in all of American history when this was changed, not during our Civil War even, not during the Civil War when passions ran so high and this Nation was drenched in blood like few nations have been throughout their history. That Constitution was not changed. It was not changed during any of our foreign wars. It was not changed during recessions. It was not changed during depressions. It was not changed during scares or panics or whatever happened in this country.

That Bill of Rights has not been changed even during times of great emotion and anger like the Vietnam era, when flags were burned or desecrated far more than they are today. Our first amendment was unchanged, unchallenged, as much as we might have disagreed with what was going on at that time, as abhorrent as we found the actions of a lot of people at that time in their protests against the Vietnam war. But now we are told that unless we alter the first amendment, unless we place a constitutional limit on the right of speech and expression that the fabric of our country will somehow

be weakened. Well, I just cannot bring myself to believe that that is the case.

I think once the American people think this issue clear through, I do not think they will buy it, either, whether this passes or not. I do not think the American people will buy it. Once you get past the first gut feeling, if you saw a flag burning, of doing something about it, as I would—so many of the people who visited me in my office the last couple of days would do the same thing—would take action themselves against such activity. Much as that might be the case and satisfying though that might be, I think we have to look at the long term on this, get by the emotion of that moment and think what it is we are dealing with.

What we are dealing with is the Bill of Rights, dealing with that first amendment to the Bill of Rights. We are saying for the first time in our country's 200-year history, we are going to make, albeit maybe just a tiny crack, but it will be a tiny opening that could possibly be followed by others.

That first amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" or the second item, "or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The part we are dealing with today is freedom of speech—freedom of speech. We are talking about freedom of expression. The Supreme Court has held on two separate occasions that no matter how much the majority of us, 99.999 percent of the people of this country disagree, that tiny, tiny, fractional, misguided minority, still under our Bill of Rights they have the right to their expression. Their expression is looked at as coming under that freedom of speech.

You have to look at it from that standpoint. Are we going to even make a tiny opening in changing that first amendment that could be followed on, if we have a tiny, tiny, tiny minority that we do not agree with their religious beliefs, if we have a tiny, tiny, tiny minority that we do not agree with what the press says? There is no body more critical in this whole country of the press than the people in this very room, and me included along with them. We do not like some of the things that happen in the press.

Do we want to open even a tiny, tiny, tiny chance that they might restrict our ability to assemble peaceably? And do we want to take a tiny chance that we would not be able to petition our Government for redress of grievances? Those are the things that are covered in that first amendment, known as the Bill of Rights, along with the other amendments that were incorporated before the Constitution was signed, before it even came into being.

I think there is only one way to weaken the fabric of our country, our

unique country, our country that stands as a beacon before other nations around this world. You know when you think about someone burning the flag, I truly do feel sorry for them. I honestly do. My initial gut reaction would be to stomp them, go after them, get them, stop the burning, and so on. It would be a natural reaction that so many people would have as well. I know all the ones that visited my office yesterday, I would not have to ask them to do that same thing.

But that would be one way of showing our unhappiness with these few misguided souls. At the same time we would be taking action against them, I truly would feel sorry for them. Have they never known the feeling inside of looking at that flag and being proud? Have they never been able to apparently work in any way for their country or the military in war or peace, either one, in which they were called to take action for a purpose bigger than themselves?

I say this morning that is one of the most exhilarating things that can ever happen to a man or woman, to be able to represent their country and be called to something, to a purpose bigger than themselves. I feel sorry for people who have never had that experience. It is something you cannot really explain.

We had a parade once I was involved in down on Pennsylvania Avenue and I addressed a joint meeting of Congress down at the other end of the Capitol, and everybody was waving flags out there. Everybody was waving flags. My comment when I opened down there, I said it just meant so much to me to see all the flags waving coming down Pennsylvania Avenue. It made a hard-to-define feeling within that I could not really describe in words, but I hope that we never lose that hard-to-define feeling as a nation, as individuals and a nation. We would be a lesser country if we lost that exhilaration, that feeling of pride when we see a flag and see it displayed and see people's excitement.

But I feel sorry for those people who have never known that feeling. I truly do. There would not be any problem with people burning the flag if everyone had that individual experience. But it is by retreating from the principles that the flag stands for—"principles" underlined 16 times—principles that this flag stands for, that if we retreat from those principles, that will do more damage to the fabric of our Nation than 1,000 torched flags ever could do.

The first amendment—I read it a moment ago—says simply and clearly: "Congress shall make no law *** abridging the freedom of speech"—freedom of speech. For 200 years, in good times and bad, in times of harmony and times of strife, we have held those words to mean exactly what they say. That "Congress shall make no law"—no law—that will in any way cut back on that freedom of speech, meaning freedom of expression, as the Supreme Court has said.

And now, ostensibly to prohibit something that very rarely happens anyway, we are asked to alter those first amendment words to mean that Congress may make some laws—little ones—some laws restricting freedom of expression.

I know the other side says, "Well, what we're doing is putting this back to the States." They want us to just put it back to the States and let the States decide this. I do not care for that approach.

Let me tell you, we are one Nation, one Nation under God, indivisible. It does not say we are going to split things up and we will treat our flag differently and the Constitution will only apply here, the Bill of Rights only applies one way in one State and a different way in another State. I do not agree with that.

So I do not want to see us make some laws, even tiny laws, even the potential of a tiny little crack in that Bill of Rights that would restrict freedom of expression. I agree with, I believe the man's name is Warner. He is a lawyer here in town. He was in the Marine Corps and prisoner of war. One of his captors brought to him a picture of a flag burning in this country and said, "There, that shows what the people think; that shows that it is no good. See this."

He said, "That is what freedom is all about. That is what expression is all about," or words to that effect. I did not bring his exact words here. He said he was proud of it, and it completely crushed his captor. The fellow did not know how to react to that.

Yet, he was right. We can say that this time this law might be about flag burning. The next form of political expression that we might seek to prohibit would be in the religion area. There are lots of religions today. Splinter groups I do not agree with at all and, I would say, 99.99 percent of the people of the country would not agree with them at all. But do we make any restriction on how they can practice their religion? No.

I do not like a lot of things the press writes today, but do we make any tiny little restriction on the press to pull back on what they can do? Or assemble or petition the Government, the other things that are covered in that first amendment.

So we can say this time the laws would be about flag burning or flag desecration, to use the exact words. But what will the next form of political expression be that we seek to prohibit, if we start a crack that has not occurred, not in the 200-plus year's history of this country?

I do not think there is necessarily a slippery slope out there that if we make this little crack here that everything is going to go downhill from there and away we go and we are going to see freedom of speech restricted, everything else and we do not know where that slide will end. I do not think that will happen, but do we want

to take a chance that any misguided group of people in the future would even think about going to that end? And for what? For a threat that, at least in current years, is practically nonexistent?

I had been told there was not a single flag burning this year. I was corrected yesterday, and the people visiting me said they believe there were three they had documented this year. That is one per approximately 90 million people in this country. We are about 260 million, close to 270 million. Even if those are true, and I do not question it. The gentleman who told me seemed to know what he was talking about, so I accept his version of this. But we are talking about one incident out of 90 million people. So I find it a little difficult to think that this is a very major problem at the moment.

But some will ask, is not desecrating the flag obnoxious, abhorrent and offensive to most, and yet it is within our right? You bet. I find it just as obnoxious and abhorrent as any person possibly can, but I try to look beyond that.

I said before, if I was present when somebody started to burn a flag right there, I have no doubt whatsoever I would join the many others here, and the galleries, who would take whatever action to stop it, physical or however we had to do it.

But then you have to think beyond this. Do we want to change the Constitution of the United States and take even a chance of something that is 1-in-a-90 million shot of our citizens doing something like this, if that is the number from this year?

Of course, desecrating the flag is offensive. It is offensive to the vast majority of Americans. Almost everybody. But that is precisely the reason we have a first amendment, to protect the kinds of political expression that are offensive and out of step with majority opinion in this Nation.

The majority opinion said that we should not have civil rights in certain parts of this country. We went ahead with it. That was a much more pervasive problem than this is. But you do not need a first amendment to protect the expression of political views with which everyone else agrees. That is not what we need the first amendment for.

You need the first amendment to protect minority points of view that the vast majority of people disagree with. That is what the protection is all about, and that is what sets this country of ours completely apart from any other nation in the world.

So I think we have to get beyond just the visceral gut reaction of someone burning a flag and think beyond that as to what the implications are if we take action against those poor, misguided souls that I truly do feel sorry for, for reasons I spoke about a moment ago. They deserve to be protected. I may not like it, but they deserve to have their rights protected as much as I deserve to have my rights protected.

So the amendment is to protect minority points of view with which the vast majority of people disagree. Protecting the minority viewpoints against the tyranny of the majority is exactly the point of the first amendment and why the Founders only agreed to approve the Constitution with the understanding that it was to be included.

It has often been said it is possible to detect how free a society is by the degree to which it is willing to tolerate and permit the expression of ideas that are odious and reprehensible to the values of that society. You and I and a majority of our fellow citizens find flag burning and desecration to be vile and disgusting. But we also find Nazis marching in Skokie, IL, or the Ku Klux Klan marching and burning crosses in Selma, AL, to be vile and disgusting. But if the first amendment means anything at all, it means that those cruel and poor misguided souls, many of them I think demented, have a right to express themselves in that manner, however objectionable the rest of us may find their message.

But what about the argument that the first amendment is not and has never been absolute, that we already have restrictions on freedoms of expression and that a prohibition on flag burning would simply be one more? After all, it said freedom of speech does not extend to slander, libel, revealing military secrets or yelling "fire" in a crowded theater. That is true. To the extent that flag burning would incite others to violence in response does not constitute a clear and present danger, and that is what the Supreme Court has said in their language. That is their language. The difference here is whether it is a clear and present danger that we have every right to try to avert.

But this argument misses a key distinction, and that distinction is that all those restrictions on free speech I just mentioned threaten real and specific harm to other people, harm that would come about because of what the speaker said, not because of what the listeners did.

To say that we should restrict speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the first amendment.

What about the argument that flag desecration is an act and is not a form of speech or expression that is protected by the first amendment? Well, I think that argument is a bit specious. Anybody burning a flag in protest is clearly saying something. They are making a statement by their body language, and what they are doing makes a statement that maybe speaks far, far louder than the words they may be willing to utter on such an occasion.

They are saying something, just the same way as people who picket, or

march in protest, or use other forms of symbolic speech are expressing themselves. Indeed, if we did not view flag burners as something we find offensive and repugnant, we surely would not be debating their right to do so.

Let me say a word about something that has gotten short shrift in this debate, something we should consider very carefully before voting on this amendment. I am talking about the practical problems with this amendment. Let us say we pass it, the States pass it, it becomes an amendment, and we change the Constitution. Then what a nightmare we would have enforcing it.

First off, we are going to have 50 different interpretations. There is not going to be just one Nation on the Constitution or on the Bill of Rights anymore. There are going to be 50 little interpretations of what is in that Bill of Rights. I do not want to see that happen.

But if Congress and States are allowed to prohibit the physical desecration of the flag, how precisely are we defining the flag? We do not have an official flag, as such, with an exact size, type, kind of ink, dyes, fabric, and the whole works. There is no official flag, as such. So does this amendment refer to only manufactured flags of cloth or nylon of a certain size or description, such as the ones we fly over the Capitol here and send out? I send out dozens of those every year, and I am very proud to do it. There is no official flag, so what size are we talking about? Does it refer to the small paper flags on a stick we hand out to children at political rallies or stick in a cupcake at a banquet? Those flags are often tossed on the floor or in a garbage can at conclusion of an event. I really do not know. I am asking these questions here.

How about back in 1976 when we had the bicentennial? At that time, they were selling flag bikini swimsuits for women and boxer shorts for men. I remember seeing a rock concert one day, and at that time it was an abhorrent thing to me. The guy is strumming away on his guitar, and all at once he takes his pants off on the stage on that great occasion because he had flag shorts on underneath. How about bikinis? Should we permit flags to be worn as bikinis? We know they get soiled once in a while, too. Think of that. I do not want to use all these improper words in the Senate Chamber, but do we want someone possibly urinating on the flag of the United States, worn as shorts or a bikini? I do not. I find that abhorrent. But are we going to restrict that? I probably would like to restrict that, I can tell you.

How are we going to define this as to what happens? How about the guy who jogs down the street with a flag T-shirt on and becomes drenched with sweat? I do not like that, but is it desecration? He is probably proud that he is wearing the flag.

How about a guy that has an old flag with grease all over it, and he wants to

destroy it. You are supposed to burn it to destroy a flag. So he holds it up and he is going to burn it and then he says at the same time, "I am doing this because I do not like the tax bill they passed last year, and I am doing it in protest. I am burning the flag because I do not like what they did in Washington." Are we going to lock him up? Remember, the proper way to destroy a flag that is old or has become soiled is to burn it. But what if he does it in protest? What was his intent? Every lawyer will tell you that the toughest thing to prove is intent.

We could go through example after example after example. We have a postage stamp now that has a flag on it. I was proud when they did that. I wrote a letter complimenting the Postmaster General for that, putting that on every piece of mail going out through the country, to remind people that we have a flag of the United States that stands for something; it stands for principles. What if you take a postage stamp flag and put a match under that thing and it burns up and you say, "There," and you stomp on it? Can you be arrested under the new legislation?

I do not know what the courts would do in a case like that. We can go on with all kinds of examples here of how this would be very difficult to administer, and it would be subject to 50 different interpretations. I might be able to do something in Ohio, and I drive across the Ohio River to Kentucky, West Virginia, or Pennsylvania and the same thing might be illegal. I could be arrested for doing something across the river, if we are going to have 50 different State interpretations along this line.

So I come to the floor today to say that I think—and I regret having to feel that this amendment should and must be defeated, but I really feel that the dangers from it far outweigh the threat that we have to the flag from those 1 in 90 million, if the figures are correct, Americans that have burned a flag in protest this year, as I was told yesterday. I had been told there were no examples this year, but it was corrected, and I was told there were three certified examples of flag burning. That means 1 for every 90 million Americans.

Is this something we need to correct as a major problem for this country with an amendment to the Constitution of the United States of America, which guarantees the freedom of speech and of expression in the Bill of Rights? It was not going to be signed by the States unless that was included. They felt that strongly about protecting the freedom of people to express themselves.

I think history and future generations alike will judge us harshly, as they should, if we permit people who would defile our flag—or whatever disrespect they pay to the flag, whether they were stomping on it, or burning it, or using it as clothing, or whatever—I think future generations will

think that they defiled our flag, but we do not want to let them hoodwink us into also defiling our Constitution, no matter how onerous their acts may be. It would be a hollow victory, it seems to me. We must not let those who revile our freedoms and our way of life trick us into diminishing them, or even take a chance of diminishing them.

Mr. President, I do not think we can let the passions of the moment stampede us into abandoning principles for all time. My gut reaction is that if there was a flag burning or desecration here, or somebody showed disrespect for the flag, it would be the same for the Presiding Officer and everyone in this Chamber and all those in the gallery here—we would probably take our own physical action to stop it right here and now. But then we had better think about, before we take action, what that Bill of Rights means and how precious it is. In all 200 years, we have never made a single change to it.

This Nation was not founded until that provision was included in the Constitution. They would not sign it unless that first amendment was included. If we are going to continue to be the land of the free and the home of the brave, I think we had better be very, very careful. We pledge allegiance to the flag, and that is not an official Government document. Something came up and it became adopted as sort of a pledge of allegiance. We say, "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands," and we reel that off sometimes at a dinner, while we are looking at our steak and waiting for the dinner to get started, and we think, Well, OK, and we sort of reel those words off and do not think about them. The rest of that pledge we should think about. I think it does tie in with this.

Then we say those words "one nation." We pledge that we will be one nation. These are the principles our flag stands for—one nation. We are going to stand before the rest of the world not as North and South, East and West, black and white, Republican or Democrat. We will be one nation before the rest of this world, and every single person is important, and we will be in every part of this country, and we will be one nation, a nation of might, a nation of resolve. One nation—not split up with 50 interpretations of the Constitution, 50 interpretations of the Bill of Rights for different parts of the country.

The next words are truly unique. I have traveled all over the world and looked at government documents all over this world and never seen the next two words anywhere—"under God." We say, whether we are Protestant, Catholic, Jewish, Moslem, Buddhist, Baptist, Presbyterian—as I am—or whatever you are, we recognize there is a higher power than all of us. If we just pray and listen a little bit—listen a little bit—maybe we will get enough guidance about how to go about helping this country in the future.

It is under God; not just under getting money, not just under the greed of power, not just under a single standard of enforced religious beliefs which are also covered in that very first amendment of the Constitution. Our religious beliefs are not to be imposed by those that think that they, and only they, know and hold the truth. We sure have enough of those around these days. "Under God." Pray a little, listen a little, and maybe we will get some guidance.

Then we say "indivisible." Not rich against poor, young against old, workers against owners, but indivisible. We stand before the rest of this world as an indivisible nation.

Then we say words which I have not found anywhere else in the world, six almost magic words—"with liberty and justice for all." "For all"—underline that in our discussion today—"for all."

Liberty of what? Of course, liberty of opportunity. Sure, we want to see everyone have an opportunity. We want everyone to get a good education. We want much to have a fair shot at a good job and all the other things that we know about.

It is not just for a favored few. It is not just for the rich and the wealthy and the land owners. It is for everyone in this country. And the protections are for everyone in this country. It is not just for those born to power and privilege.

That first amendment talks of this. It says we will be free in our religion; we will be free in our speech, including "expression" which we are talking about today; we will be free in our assembly; and we will be free in redress of our Government. "With liberty and justice for all"—liberty of opportunity and liberty of expression of those freedoms without any question for every single person—for all.

Then we say "and justice for all." That means equality. We are all equal, whether you are President of the United States or you are outside digging a ditch, you have the same protections, the same rights as any other person in this country. It does not say "except" in the case where there are 90 million and one goes astray we will penalize that guy and lock him out. It does not say that.

I think that is a dream for which America still strives. We do not have a perfect society, not by a long shot. We have a long way to go, whether we are talking about civil rights or economic fairness in our country or the rights of every kid to get a decent education. We have so far to go.

I am so proud of this country for addressing these problems. We are willing to stand up and address them and do it in an open forum. We do it every day here on the Senate floor. Where else in the world are people so concerned about the rights of every single individual in their nation—nowhere else in this world.

Take the pledge. "I pledge allegiance to the flag of the United States of

America, one nation"—we will keep it one nation, under God. You bet. That is something unique in this country. We say there is a higher power, whatever our approach to that throne of grace may be. "Indivisible"—we will not do things that tear our Nation apart and make us live under different rules. We will live under the same rules as much as we can. "And with liberty and justice for all"—the liberty of opportunity, the liberty of sameness, how we are treated by our Government, and the justice of equality.

Thank God for our country. I yield the floor.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, first let me commend our colleague from Ohio. Few have a better right to discuss issues affecting attitudes about our Nation than Senator JOHN GLENN.

His history has been one of service in so many areas—as a pilot, as an astronaut, as a Senator. Now I know JOHN GLENN very well. One area he is not so good in, we have gone skiing together, he is not very good there, but in matters of profession and decency and honor few have the credentials that JOHN GLENN has. I am delighted to hear his comments. I share the views of my friend and colleague.

Mr. President, this is a tough issue. It is tough because people of good will on both sides feel so differently about the issue. The veterans organizations that I belong to are very much supportive of taking good care of the flag, of not permitting the desecration, if that is possible.

I am a life member of the VFW. I served overseas, World War II, and yet we come up with the kind of disagreements on this matter that we have. I regret it.

I respect all the colleagues with whom there may be a difference in point of view—those who think we need an amendment. I disagree with the decision they made but I never questioned their patriotism nor do I expect them to question mine or Senator GLENN or Senator KERREY or others who have served in uniform. Others need not have served in uniform to have a point view that has to be listened to and perhaps respected.

I want to express my strong support, Mr. President, to the flag of the United States and my outrage at those who would desecrate the flag in any way. At the same time, I rise to express my deep concern about amending the U.S. Constitution and the Bill of Rights.

I am not a lawyer, Mr. President, but as a private citizen and as a Senator I have always been vigilant about restrictions on the basic freedoms that make America unique in the world. Perhaps because I am the son of immigrant parents whose families fled tyranny for the promise of freedom, the Constitution and the Bill of Rights for me are not abstractions. I was raised to respect them as a sacred promise of freedom. Promises compelling enough

to convince my grandparents as they carried my parents to travel halfway across the Earth to live under the protections of the Bill of Rights and the Constitution. They are protections that have drawn millions to our shores.

I remember my dear grandmother, who was born in Russia—my mother was about a year old when she was brought here—talking about what a great country this is. With a thick accent she said, "In this house"—it is funny, she drew her patriotic commitment along verbal lines—she said, with the heaviest accent you can imagine, "In this house we speak only English." It was quite remarkable. It left an impression on me that has lasted all my life.

This country has been so good to me and my family, beyond my wildest boyhood dreams; even more important, beyond my mother's most precious dreams. It has been that way for millions of us, and for that reason I volunteered to do my part in World War II. For that reason, although the private sector was a very comfortable arena for me, I sought public office as a U.S. Senator. I wanted to do whatever I could to give something back to our country, our country which continues to serve as a beacon of hope for millions seeking freedom and a better life around the world.

One of the reasons I left the private sector to come here was I wanted to leave my children, and now my grandchildren, an inheritance that went far beyond the value of money and other assets, and that is a strong America, an America where all people could enjoy their freedom as long as they did not encroach upon others. That is the way I feel about our Nation. That is the way I feel about the symbol of our flag.

For that reason, just as I revere the Constitution and the Bill of Rights, I love the flag, which we at my home fly regularly, which embodies our ideals, our liberties, our history and our sacrifices. In that, I know I stand virtually with all Americans.

In my mind, I contrast those patriotic Americans with the image of the flag burner, whether on our shores or anyplace else; pictures on the front pages of the paper, having our flag burned by some in Bosnia. It angers me. We are not there to hurt. We are there to help. But the thousands of patriotic Americans I know, who have been touched by the tragedy of war or sacrifice for this country, are shocked and angered by the view, the image of someone destroying the flag, burning the flag. They are showing their contempt for this incredible Nation in which we live.

The flag is a unique national symbol. I have a special, personal affection for it, as I said, along with all Americans. It is the one great symbol that unites our Nation. The flag represents more than 200 years of our history and our culture.

As a veteran, as a Senator, and as an American, son of immigrants, the flag

represents noble things to me. And flag burning is an ugly, despicable, and cowardly act. When I have seen it, though I have not seen it directly—when I have seen pictures of it, it sickens me and it saddens me. Those who burn the flag are ingrates. They lack the courage and the character to fight for change through a well-established and fair and just process. Instead, their mission is different. They want to infuriate and enrage and offend, more than they want to achieve their goals through their attacks on this precious symbol. They are misguided and they deserve the contempt of all of us.

But I am not prepared to sacrifice the principle of freedom of expression embodied in the first amendment to protect a symbol. I worry about compromising the Bill of Rights. I am unwilling to risk, for the first time in our history, narrowing the freedoms expressed in the first amendment. Desecration of our flag is outrageous and my anger at such incidents wants me to seek vengeance, to strike back and to punish those who commit these acts.

However, when I think about how this offensive dissent might be choked off, I conclude that in the process we run the terrible risk of trampling on a fundamental right of our democracy, the right to disagree, the right to speak out freely, to exercise dissent no matter how disagreeable.

There is no right more fundamental to our democracy than the right of free speech, the right to assemble, the right to express ourselves on the issues of importance as citizens. That is why the first step of a despot is to squelch free speech. Silence the people and you cut the throat of democracy.

Our first amendment protects everyone's right to speak out. It is the citizen's shield against tyranny. It is what makes America special. It is what makes America a model for those aspiring to freedom around the world.

The right of the individual American to be free is the right to do what one wishes short of violating the rights of others, and that includes the right to do or say what is popular, certainly—but it also includes the right to do or say the unpopular. For it is then, when actions give offense, that our freedom is put to the test. It is then, precisely then, that we learn whether or not we are free.

To defend the right to freedom of speech, freedom of expression, is quite different from defending the speech that flows from the exercise of that right. It is perfectly consistent to condemn flag burning, as most Americans do, while defending the right, as unpleasant as it is, for someone to abuse it. The flag is a symbol of our freedom. Desecrating it is offensive because it desecrates every one of us. But what would be even more offensive than the desecration of the symbol would be the desecration of the principle that it symbolizes. In the end, symbols are only symbols. If we desecrate the real thing, the principles our founders

fought so hard to secure and that so many since have sacrificed their lives to preserve, we will lose something far more valuable, far more difficult to restore.

I have heard it argued that flag burning is not speech but rather conduct, and thus is not protected by the first amendment. But that argument reflects a misunderstanding of the first amendment. All speech, in a sense, is conduct. When one vocalizes, or uses a printing press, or types into a computer, that is conduct. But it is generally protected conduct if it expresses a political idea. Flag burning is despicable precisely because it expresses a despicable political idea.

Flag burning insults the United States of America. It insults the greatest Nation on the face of the Earth. And that is a disgusting idea. Just about every American is outraged by that idea. But the whole point of the first amendment is to protect the expression of ideas, no matter how despicable.

Throughout the history of our Nation, we have never banned the expression of an idea solely because others have found it offensive; never. We have never sanctioned speech that hurts others, like yelling "fire" in a crowded theater. But we have never banned speech just because it made others uncomfortable. And I feel that this amendment would do just that for the first time. This is a very, very dangerous precedent, as we heard from Senator GLENN a few minutes ago. A little opening often transfers into a giant hole.

Once we ban one idea because it offends some people, other ideas will be threatened as well. Where do you draw the line? It is a dangerous and slippery slope, and ultimately can lead to tyranny.

No doubt, those who are proposing this constitutional amendment are entirely well meaning, but I am reminded of something that the great Supreme Court Justice Louis Brandeis said. He said, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding."

By no means do I intend to suggest that those who feel differently on this amendment are without understanding. But I think this expression, this sense, embraces the concerns that we have to have, that our greatest danger to liberty often lies within our society.

I would add, Mr. President, that if freedom is lost, it is most likely to be lost not in some cataclysmic war. Americans are too patriotic, too willing, too dedicated a country for that to happen. It is most likely to be lost a word at a time, a phrase at a time, a sentence at a time, an amendment at a time. We saw that happen in one of the great—formerly great—nations of the world before World War II in Germany. One of the first things they did was start to ban speech, ban expression, and the rest is one of man's darkest hours, or periods, in history.

Mr. President, I think it is dangerous to tinker with the Bill of Rights, and especially with the first amendment.

I hope my colleagues will stand by the first amendment and support our laws for the flag by working to make our democracy even stronger.

Thank you. I yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have listened to the various speeches presented today about the flag amendment. There are people on both sides who speak on this issue with sincerity. For the life of me, I have a rough time understanding some of these arguments. People come to the floor and say that they want to protect the flag, that they love the flag, and that they are patriotic. I do not question that.

All that this amendment says is that Congress has the power to prohibit flag desecration. Everybody knows Congress is going to want to pass a statute once the amendment passes. It will be done reasonably.

With regard to the first amendment, let me point out that this is not an amendment to the first amendment. The flag amendment is the correction of a faulty Supreme Court decision. Chief Justice Warren, Justice Black—first amendment absolutists—Justice Fortas, Justice Stevens, just to mention four liberal Justices, have said that prohibiting flag desecration does not violate the first amendment.

Let me just respond to those people who think that free speech is an absolute, that you can never violate it, that you can never do anything at all to regulate it. First of all, the protection for free speech does not apply to flag burning. Flag burning is conduct. How can anybody say it is speech when in fact it is an act? But let us assume for the sake of argument that it is speech. Let me just list 20 types of speech that are not protected by the first amendment, because people do not realize that there is a lot of speech not protected by the first amendment. Society has chosen not to protect these types of expression. The Supreme Court chooses not to do so.

Let me cite "fighting words." In *Chaplinsky versus New Hampshire*, a 1942 case, the Court said that fighting words can be banned.

Second, in the 1969 case of *Brandenburg versus Ohio*, a very important case, as was *Chaplinsky*, the Court said that speech that incites imminent violence was not protected by the First Amendment.

Third, libel is not protected by the first amendment, see *New York Times versus Sullivan*, 1964.

Fourth, defamation *Beauharnais versus Illinois*, a 1952 case.

Fifth, obscenity is not protected by the first amendment. See *Miller versus California*, a 1973 case.

Sixth, speech that constitutes fraud, conspiracy, or aiding and abetting is not protected by the first amendment.

The first amendment is not absolute. There is a lot of speech that is not protected by the first amendment.

Seventh, commercial speech in certain situations is not protected, see *Central Hudson Gas & Electric versus Public Service Commission*, a 1980 case.

Eighth, political contributions are not protected by the first amendment under certain circumstances, see *Buckley versus Valeo*.

Ninth, child pornography is not protected by the first amendment. That is the case of *New York versus Ferber*.

Tenth, political speech of Government employees in certain situations is not protected by the first amendment—*Pickering versus Board of Education*, a 1968 case.

How about speech interfering with elections? That is No. 11. See *Burson versus Freeman*, 1992 case.

These are all cases where we have content-based restrictions on the first amendment.

So people come out here and claim: "My goodness. We cannot amend the first amendment."

All of these cases have limited the reach of the first amendment, and rightly so.

Who wants to allow fighting words? Who wants to allow words that incite people to violence? Who wants to approve or uphold libel that destroys people's reputations? Who wants to approve defamation? Who wants to allow obscenity in this society, true obscenity, that is so foul that the community standards decry it? Who wants to uphold speech that constitutes fraud, conspiracy or aiding and abetting? Who wants to use commercial speech that is improper? How about political contributions? How about child pornography?

Under current law, the government may regulate these types of speech without violating the first amendment. Naturally, all of these are areas where the Court, or the law, has said that the first amendment does not provide an absolute protection.

Let me provide my colleagues with some reasonable time, place, and manner restrictions on expression.

Twelfth, this is the 12th illustration—is restrictions on when Government property, such as national parks, can be used. That is *Clark versus Community for Creative Nonviolence*, a 1984 case.

Thirteenth, picketing in front of a home—that is *Frisby versus Shultz*, a 1988 case.

Fourteenth, posters on street posts—*Members of the City Council of Los Angeles versus Taxpayers for Vincent*, a 1984 case.

Fifteenth, restrictions on speech in prison—the court has held in *Turner versus Safley*, a 1987 case that restrictions can be imposed on speech in prisons.

Sixteenth, regulation of speech in schools—that is the *Hazelwood School District versus Kuhlmeier*, a 1988 case.

Seventeenth, the use of soundtrucks and loudspeakers—that is speech. But

it can be regulated under the Supreme Court's decision in *Kovaks versus Cooper*, a 1949 case.

Eighteenth, zoning of adult movie theaters—that is a matter of speech, but see *Young versus American Mini Theaters*, a 1976 case.

Certain speech in airports has been banned.

Restrictions on door-to-door solicitation—that is *Schneider versus State*, a 1939 case.

And, finally, the 21st illustration I will give—and then I will stop—administrative fees and permits for parades. That is *Cox versus New Hampshire*, a 1941 case.

These are all limitations on speech under the first amendment. So I find it hard to understand the other side's arguments that we are going to interfere with the first amendment's rights and privileges and that we will be amending the first amendment. All 21 of these examples are certainly exceptions to free speech, and I am sure that the Supreme Court has recognized others.

So this is not something that is unique or new. We are talking about the flag of the United States, the national symbol. Some people claim: "Oh, my goodness. The rights of free speech supersede everything." Well, they do not. And especially where speech is not involved. But why can we not ban in the interest of patriotism and honor and values in this country, despicable, rotten, dirty, conduct against our national symbol?

It amazes me that these folks come in here and say how they support the flag, how wonderful it is, and how terrible it is for people to do these awful things—to smear the flag with excrement, to urinate on it, to tramp on it, to burn it. What do we stand for around here? Have we gotten so bad in this country that no values count?

I know people are going to vote for this amendment because they are tired of the lack of values in our country. They are tired of people just making excuses for all kinds of offensive conduct in this country. Have we no standards at all? Do we have to tolerate every rotten, despicable action that people take just because we are free people? The answer to that is no, no, no.

I am willing to admit my colleagues are sincere. Bless them for it. But they are sincerely wrong to treat the flag like this while they say they uphold it and honor and love it, and yet they will not vote for a simple amendment that gives Congress the power to say what desecration of the flag really is.

That is all it does. Congress does not even have to act if this amendment is passed. But we all know it will. Congress will act.

Let me just talk a little bit about the McConnell amendment.

Mr. President, make no mistake about it, Senator McConnell and I are the best of friends, but this McConnell amendment absolutely would kill this flag protection amendment. The

McConnell amendment is a killer amendment, and I think everybody knows that.

It replaces the flag protection amendment with a statute which cannot withstand Supreme Court review after Johnson and Eichman, and is far too narrow to offer real protection for the flag in any event.

The American Legion and the Citizens Flag Alliance are strongly opposed to the McConnell proposal.

Any Senator who has cosponsored Senate Joint Resolution 31, the flag protection amendment, or stated his or her intention to vote for it, must vote against the McConnell amendment. You cannot be for the flag amendment and the McConnell statute as proposed, which will completely replace the flag amendment.

Mr. President, I appreciate the desire of the Senator from Kentucky to do something to protect the American flag. I know he feels strongly about the flag. I think that is true about everybody in this body. Rightly or wrongly, they feel strongly. And I hope that, in the end, my friend from Kentucky, will see his way clear to supporting our constitutional amendment should his amendment fail.

But I say to my friend from Kentucky, with great respect, we have been down the statutory road before on this issue. It is a dead end, plain and simple.

I well recall my friend from Delaware, Senator BIDEN lining up a variety of constitutional scholars to support his statute in 1989. Senator DOLE, Senator GRASSLEY, and I, told the Senate that the Supreme Court would strike it down. The statute passed by a vote of something like 91 to 9. Sure enough, the Supreme Court took 30 days after oral argument and less than eight dismissive pages to throw it out in *United States versus Eichman*. I say with all respect, the Senator from Kentucky now invites the Senate down the same barren path.

The Supreme Court, in its Johnson and Eichman decisions, has made its position crystal clear: Special legal protections for the American flag offends the Court's concept of free speech.

In Johnson, the Court made clear that for a State to forbid flag burning whenever such a prohibition protects the flag's symbolic role, but allow such burning when it promotes that role, as by ceremoniously burning a dirty flag, is totally unacceptable. The Court says this allows the flag to be used as a symbol in only one direction.

Similarly, if flag desecration is singled out for greater punishment than other breaches of the peace or incitements to violence, such special treatment promotes the flag's symbolic role. This, sadly, the Court will not tolerate—they have told us this twice, now.

In Eichman, the Court clearly declared that no statute which protects

the flag as a symbol would survive constitutional muster. The Flag Protection Act was held invalid, like the Texas statute in *Johnson*, because of the "same fundamental flaw: [they both] suppress expression out of concern for [its] likely communicative impact." [496 U.S. at 317]. Even though Congress had attempted to write a broader statute to avoid the problems of the Texas law, by making all physical impairments illegal except for ceremonial disposal of a worn flag, the Court found the act unconstitutional anyway because "its restriction on expression cannot be justified without reference to the content of the regulated speech." [Id. at 318]. As Prof. Richard Parker of Harvard University Law School has put it, the Supreme Court found the act invalid because it "involves taking sides in favor of what is 'uniquely' symbolized by the flag—our 'aspiration to national unity.'"

Indeed, my friend from Kentucky, has made very clear in his remarks upon introducing the bill what this bill is all about—it is not about breaches of the peace or theft. It is about protecting the flag as a symbol. He said on October 19, 1995:

Flag burning is a despicable act. And we should have zero tolerance for those who deface our flag . . . I am disgusted by those who desecrate our symbol of freedom. . . .

Mr. President, those words reinforce the bill's fundamental conflict with *Johnson* and *Eichman*. So does the finding in the proposed statute which describes our flag as:

a unique symbol of national unity and represents the values of liberty, justice, and equality that make this Nation an example of freedom unmatched throughout the world.

But many who burn the flag disagree with every word of that finding. Some of them believe the flag represents oppression, exploitation, and racism. They are wrong, but the Supreme Court has made clear that Congress and the States cannot protect the flag in order to preserve its symbolic value in one direction. I believe the Supreme Court is no more correct than it was in *Dred Scott* and *Plessy versus Ferguson*, but we cannot overrule such errors by statute.

While it is true that flag desecration can be penalized pursuant to a general breach of the peace statute, in the same way other breaches of the peace are punished, offering special protection for the flag is intended to enhance the flag's symbolic role. The Court will not buy it.

Further, even if this statute was upheld, it is, with great respect, very inadequate. Not every flag desecration will cause or likely cause a breach of the peace or violence. That will depend on circumstances. Frankly, I do not want the protection of the flag to be limited to those narrow circumstances.

And these are very narrow circumstances. A flag desecrated in the midst of a crowd of those sympathetic to the desecrator will not elicit a penalty. Those who see it on television or

in a news photo or from a distant sidewalk may not like it, but it will not violate a breach of the peace statute.

Moreover, of course, not every flag which is physically desecrated is stolen from the Federal Government, or stolen and desecrated on Federal land.

Indeed, this statute in no way changes the result in the Texas versus *Johnson* case, which creates the problem bringing us to the floor of the Senate in the first place.

In *Johnson*, the State of Texas defended its flag burning statute on the ground that it prevented speech that caused violence or breaches of the peace. The Court brushed aside Texas' evidence that witnesses of Gregory *Johnson's* flag burning were seriously offended and might have caused disorder. Instead, the Court simply noted that—

No disturbance of the peace actually occurred or threatened to occur because of *Johnson's* burning of the flag. . . . The state's position . . . amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that expression may be prohibited on this basis. Our precedents do not countenance such a presumption. . . . [491 U.S. at 408].

The Court also determined that *Johnson* did not run afoul of the fighting words doctrine. The Court concluded that "no reasonable onlooker would have regarded *Johnson's* generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." Thus, section (a) of the proposed statute does not cover *Johnson*. Nor does section (b) cover *Johnson*, because the flag he burned did not belong to the United States. It was taken from a bank building. Finally, section (c) is inapplicable—*Johnson* burned the flag in front of city hall, not, apparently, on federal land.

If Gregory *Johnson* could not be held criminally liable under the Senator's proposed statute, who could?

I ask unanimous consent to enter into the RECORD letters from Prof. Richard Parker of Harvard Law School, Prof. Steven Pressler of Northwestern Law School, concerning the McConnell statute.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

NORTHWESTERN UNIVERSITY,
SCHOOL OF LAW,
Chicago, IL, December 4, 1995

Hon. ORRIN G. HATCH,
Chairman, U.S. Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR HATCH: You have asked for my thoughts regarding the constitutionality of S. 1335, the Flag Protection and Free Speech Act of 1995. I understand that the sponsors of the legislation, based on an analysis performed by the Congressional Research Service, and apparently also advised by some legal scholars (whose names, as far as I know, have not been made public) have asserted that the act would be able to pass muster in any court review of the act. In my view that is simply incorrect. At least as far

as the key section of the proposed act, subsection (a), is concerned, I simply do not see any way in which the statute could meet the tests for constitutionality laid down in *United States v. Lopes*, 115 S. Ct. 1624 (1995), *Texas v. Johnson*, 491 U.S. 397 (1989), and *U.S. v. Eichman*, 496 U.S. 310 (1990).

Subsection (a) of the proposed Act would penalize the conduct of flag-burning when the flag burner does so with the primary purpose and intent to produce a branch of the peace or imminent violence, and in circumstances where the offender knows it is reasonably likely to produce imminent violence or a breach of the peace. There is no general federal power given to Congress to prevent breaches of the peace or safeguard against imminent violence. For Congress to assert this power, presumably under the commerce clause, would result in the statute being struck down under *United States v. Lopez*, 115 S. Ct. 1624. If Congress cannot pass the Gun Free School Zones Act (which presumably had a similar purpose) I can't imagine that subsection (a) of the Flag Protection and Free Speech Act would survive either.

The alternative ground for the Act, Congress's power to protect the national symbol, has been clearly ruled out by *Johnson* and *Eichman*, where the court has indicated as clearly as can be that flag desecration, because the court believes it to be a protected form of speech, is a symbolic act which in no way harms the symbolic value of the flag. Indeed, in the Court's view, the desecration of the flag simply reinforces the symbolic value of the flag. Congress is thus without power to prohibit flag burning or flag desecration by statute, as we made clear in the *Eichman* case, when an assertedly content-neutral federal statute was struck down.

As you may remember, when Judge Bork and I testified before the Senate Judiciary Subcommittee holding hearings on the statute, we predicted the statute would be held unconstitutional, and we were proven right by *Eichman*. Subsection (a) of this statute would also be seen by the courts for what it is, an attempt to do by statute what can only be done by constitutional amendment. Given the decisions in *Johnson* and *Eichman*, and given the current composition of the court, the court would undoubtedly adhere to its view that such a statute is an attempt to prohibit what the court regards as protected speech. It should be remembered that the statute struck down in *Johnson* itself was grounded in similar notions about the need to prevent violence and prevent breaches of the peace, and the court simply decided that a statute calculated to prevent the expressive act of flag burning could not be regarded as devoted to a constitutional purpose.

I have heard it argued that the Supreme Court's recent decision in *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), which upheld an enhanced sentence for aggravated battery because the defendant chose his victim on the basis of his race, somehow suggests that the current court would be more lenient in upholding statutes that implicate what has been regarded as conduct protected by the First Amendment. There is no merit to this argument. In *Mitchell* the court made clear that the Wisconsin statute passed constitutional muster because the conduct at which it was addressed (the infliction of serious bodily harm) was "unprotected by the First Amendment." The conduct at which the Flag Protection and Free Speech Act of 1996 is directed—burning or otherwise destroying the American Flag in order to incite others—is the destroying the American Flag in order to incite others—is the very conduct which the Supreme Court declared in *Johnson* and

Eichman is protected by the First Amendment. Mitchell simply has no application.

The two subsections of the Flag Protection and Free Speech Act of 1995, (b) and (c), which have to do with the stealing or conversion of a flag belonging to the United States, and the stealing or conversion of a flag on federally-controlled land could conceivably survive scrutiny under Lopez (since it is the task of the federal government to patrol federally-controlled property), and it might be regarded as the task of the federal government to punish theft and destruction of federal or private property on federal lands. Even if this were so, however, and it is by no means free from doubt, this would do nothing to overcome the result in the Johnson case, and others like it, where the flag destruction is prohibited by state governments, or takes place on non-federally controlled property.

The whole purpose of the efforts undertaken by the Citizens Flag Alliance and countless numbers of Americans working at the grass roots level (which have so far resulted in the resolutions passed by forty-nine state legislatures asking Congress to send the Flag Protection Amendment to the States for ratification, and the passage of the Amendment by much more than the requisite two-thirds vote in the House of Representatives) was to reverse the result in *Texas v. Johnson*, and give back to the American people their right to protect their cherished national symbol in the manner they had enjoyed prior to 1989. This included protection by either state or federal governments, as provided for by the Amendment. As I indicated in my testimony before your subcommittee six years ago, five years ago, and most recently last summer, a Constitutional Amendment is a traditional manner in which the American people have corrected erroneous decisions by the Supreme Court, and in which they have asserted the sovereign prerogative, which belongs to them alone.

As you have indicated many times, the Flag Protection Amendment is a worthy measure, expressing noble ideals of decency, civility, and responsibility very much in keeping with American traditions. It should not be sidetracked by a Quixotic quest for a statutory solution. I urge you to do all you can to persuade the Senators who think a statute will work that they are misinformed, and that the proposed statute, if passed, would be declared unconstitutional with regard to subsection (a), and that the remaining subsections would do little to correct the unjust result of *Texas v. Johnson*.

I appreciate the opportunity to share my views with you, and I would be happy to help in any further manner I can.

Yours Sincerely,

STEPHEN B. PRESSER,
*Raoul Berger Professor of
Legal History.*

HARVARD LAW SCHOOL,
Cambridge, MA, December 4, 1995.

Senator ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: Over the last several months, I've found, in countless conversations with all sorts of people about the proposed constitutional amendment to allow our representatives to prohibit "physical desecration" of the flag, that everybody agrees. We all agree that the flag is the unique expression of our aspiration, as Americans, to national unity. We agree that, nowadays, this aspiration is under assault by a looming tide of disrespect for the very idea of shared national values, to say nothing of patriotic values. We agree that this tide must be stemmed, that when these values

are threatened, they must be defended. Rooted in our hearts, they are expressed in symbols—especially, the symbol of the flag—and so, we agree, it is those symbols that we must protect.

On October 19, Senator McConnell gave voice to this basic agreement on the floor of the Senate. He is, he said, "disgusted by those who desecrate our symbol of freedom." "[W]e should have zero tolerance for those who deface the flag," he insisted.

Yet he said that not to support the flag amendment—but to oppose it. He proposed, instead, statute to stem the tide. It would, he said, serve his purpose; showing "zero tolerance for those who deface the flag" by punishing those "who desecrate our symbol of freedom." He, no doubt, means his statute to be interpreted in light of his stated purpose. But—for that very reason—his statute would be an empty gesture, a nullity, another depressing instance of Washington's alienation from reality.

The reason is that his proposed statute would, predictably, be struck down by the Supreme Court—just as, in 1990, another statute, sold as a detour around a constitutional amendment, was struck down. Lawyers sensitive to the the spirit and tendency of the Court's recent decisions know this, even if we wish it were otherwise.

Then, on November 8, a strange thing happened. Mr. John R. Luckey (a Legislative Attorney in the American Law Division of the Congressional Research Service at the Library of Congress) wrote a two-and-a-half page memo stating—flatly and blandly—that the proposed statute "should survive constitutional attack". It is that very odd memo that I want now to answer.

Though the memo demonstrates a truncated understanding of constitutional law and the Supreme Court, it does get something right. It notes that the proposed statute would not reverse the decisions to which it is a response. It would not protect the flag against "physical desecration" in most instances—or even the instances involved in the Johnson and Eichman cases. To show its "zero tolerance" for those who "deface the flag," it would reach but a few quirky situations; where there is a "primary" purpose and intent and a probability to "incite or produce imminent violence or a breach of the peace" or where the flag was stolen from the federal government, on or off federal lands. It would make a little mole hill out of a big mountain.

On everything but this point, Mr. Luckey's memo is off base. Its reading of constitutional law is, at best, utterly wooden. It is an invitation—whether wide-eyed or winking—to another slap down of the Congress by the Supreme Court, reminiscent of the 1990 fiasco.

The subsections dealing with destruction of a flag stolen from the federal government "present no constitutional difficulties," according to the memo. It offers two bases for this misleading advice. First, it cites a few passages and footnotes in Court opinions which leave undecided the constitutional validity of prohibiting destruction of a flag owned by the government. It reads those passages and footnotes as deciding that such prohibition is valid. It thus makes the mistake that law students soon learn not to make. A question left open is not a question decided. How it will be decided depends on the general principles—and tendencies—that are moving the Court.

As the other basis for its advice, the memo notes three present statutory provisions which prohibit the theft and destruction of government property of all sorts in general. By citing these provisions, it demonstrates again that its author simply does not grasp the general principle that the majority of the Court has been invoking since 1989.

The general principle at work is this: The majority of the Court believes that flag desecration implicates the First Amendment because the flag itself is "speech." Since the flag communicates a message—as it, undeniably, does—any effort by government to single out the flag for protection must involve regulation of expression on the basis of the content of its message. The statutory provisions cited by the memo do not "single out the flag" for protection. Hence, they would satisfy the Court. But Senator McConnell's proposed statute, by its terms, does "single out the flag for protection." Hence, it would be struck down by the Court, as in 1990.

The proposed subsection dealing with incitement of violence is, the memo advises, "quite likely" to pass constitutional muster. The only virtue of this advice is in its qualification. Even at that, it is wholly misleading. For—as the memo notes—the Court has recently refused to allow government "to punish only those 'fighting words' of which [it] disapproves." The memo imagines that the subsection would not run afoul of this principle because it supposedly doesn't make a "distinction between approved or disapproved expression that is communicated" by destruction of the flag. It thereby makes the same mistake it made before. The memo fails to grasp the Court's fundamental idea: that singling out the flag for protection in and of itself makes a "distinction between approved and disapproved expression" and, so, violates the Constitution as it now stands.

Thus we come back, again and again, to Senator McConnell's statement of the purpose of his proposed statutory detour around a constitutional amendment. (In adjudicating the constitutional validity of statutes, the Court looks to the statements of their sponsors.) His purpose is to single out the flag for protection. Plainly—according to the majority of the Justices—this purpose is unconstitutional. According to the Justices, the only way to realize this purpose is to amend the Constitution, as was provided for in Article V by the framers of that document.

Is there no way around it? Those reluctant to take up the responsibility assigned by Article V seem to be grasping at any straw. Recently, for example, I've heard that some are citing *Wisconsin v. Mitchell*. There, the Court upheld a statute under which a "sentence for aggravated battery was enhanced" because the batterer "intentionally selected his victim on account of the victim's race." A prohibition of the battery of a person, the Court said, is not "directed at expression" and so does not implicate free speech. Consideration of the motive for a battery—in this case racial discrimination, a motive condemned under several civil rights statutes—doesn't offend the First Amendment. This was an easy case. It has no relevance whatsoever to Senator McConnell's proposed statute. For his statute, which singles out the flag for protection, is directed at expression. Its purpose, stated by the Senator, is to enforce "zero tolerance for those who deface the flag."

What if—to avoid a constitutional amendment—Senator McConnell were to take back his statements in favor of the flag? What if he said he never meant it? The Congressional Record could not now be erased. The Court would see it. And, in any event, it would look at the terms of his proposed statute. Those terms make plain its purpose, a laudable purpose, to single out the flag for protection. Yet that purpose is exactly what offends the majority of the Justices.

To make good on Senator McConnell's purpose, there is one and only one means under

the Constitution: a constitutional amendment.

Sincerely,

RICHARD D. PARKER,
Professor of Law.

Mr. HATCH. These letters make it very clear that the analysis by CRS is flawed.

My friend from Kentucky wrote an article in the December 5, 1995, Washington Post conceding that the Supreme Court had erred in its two decisions, Johnson and Eichman. As he said: "Much to my disappointment, the Supreme Court has found that laws protecting the flag run afoul of the first amendment. It is hard to believe that burning a flag can be considered 'speech.' But a majority of the court has found this despicable behavior to be 'political expression' protected by the First Amendment."

It is clear that Senator MCCONNELL disagrees with the Supreme Court's decision. Although, as he says, "it is hard to believe," the Court did hold that flag burning was speech. As the Court said in Johnson, "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." In these circumstances, said the Court, "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication, to implicate the first amendment." [491] U.S. at 406]

My friend makes a critical mistake in acquiescing to the Supreme Court's erroneous decision. Simply because five Justices of the Supreme Court say that flag burning is protected speech does not mean that the Court has correctly interpreted what the Constitution means. It is, no doubt, the province of the judiciary to "say what the law is," in Chief Justice John Marshall's immortal words in *Marbury versus Madison*. But it is not the exclusive responsibility of the courts to interpret the Constitution.

In fact, the Framers of the Constitution believed that Congress would have an independent duty to interpret the Constitution and to correct errors of constitutional dimension. That is one of the purposes of article V of the Constitution, which permits the amendment of the Constitution after two-thirds vote of Congress and three-fourths approval by the States. It is clear that the Framers intended article V to be used to correct errors in constitutional interpretation made by the Supreme Court. Indeed, the 11th amendment, the first amendment ratified after passage of the Bill of Rights, was approved by Congress and the States specifically to overrule a particular Supreme Court decision, *Chislm versus Georgia*.

It is our responsibility to correct the Supreme Court when it is wrong. And surely it was wrong in calling this offensive, terrible conduct protected speech.

Since my friend finds it "hard to believe burning a flag can be considered speech," as I do, he ought to agree with me that the flag protection amendment

does not amend the first amendment. It overturns two erroneous Supreme Court decisions.

To obediently accept the Supreme Court's decisions in Johnson and Eichman, as my friend from Kentucky would, when we know the Court is wrong, is to read article V out of the Constitution, and is to abdicate the Senate's responsibility to the people and to the Constitution.

My friend is also dead wrong to suggest that this amendment authorizes legislation to compel anyone to respect the flag. It does not. No one can be forced to salute, honor, respect, or pledge allegiance to the flag under this amendment. So my friend's invocation of speech codes is, frankly, totally irrelevant. It is a straw argument.

Finally, my friend from Kentucky says "it is hard to draw the line" in determining what to protect. He cites vulgar or offensive renditions of our national anthem and asks, "How can we single out the flag for special protection but not our country's song?" Two hundred-plus years of history give us the answer. There is no other symbol like our flag. Moreover, while the national anthem is a great song, it is not a tangible symbol of the country. Ironically, the Senator's question answers itself: our national anthem, the "Star Spangled Banner," is about our Nation's unique symbol.

These arguments get repeated over and over, but the flag protection amendment is no precedent for any other legislative action because of the uniqueness of our flag. Even the Clinton Justice Department acknowledged that the flag stands apart, *sui generis*, as a symbol of our country.

Right here behind me is a picture of what some of my colleagues call freedom of speech—it is pathetic. Senator MCCONNELL said here today that prohibiting the burning of the flag "strikes at the heart of our cherished freedom"—as overblown and exaggerated a statement as we will hear in this debate.

Even one of the lawyers the Senator from Kentucky relies upon for his proposition on the issue, Bruce Fein, has written that Senate Joint Resolution 31, the flag protection amendment, "... is a submicroscopic encroachment on free expression..."

My friend from Nebraska says we should not compel patriotism. He says that respect for the flag would mean something less if we were compelled to offer such respect.

Mr. President, this straw argument is offered over and over again. The flag protection amendment does not authorize any law which compels anyone to respect the flag, honor it, pledge allegiance to it, salute it, or even say nice things about it. It does not require anything like that. So that is a straw argument.

There is an obvious difference between prohibiting someone from physically desecrating our flag and compelling someone to respect it and salute it.

Moreover, I am astonished that anyone can claim that respect for our flag would mean something else if we enact legislative protection of the flag. I am surprised anybody would argue that. Until 1989, 48 States and the Federal Government prohibited flag desecration. Did any of my colleagues believe their respect for the flag meant something less in 1989 than it did after the misguided Johnson decision?

This issue boils down to this: Is it not ridiculous that the American people have no legal power to protect their beloved national symbol?

Let me just reiterate what I said this morning. On Monday we will offer an amendment which deletes the States from the amendment. The amendment will read as follows: "The Congress shall have power"—the Congress shall have power—"to prohibit the physical desecration of the flag of the United States." That is all it says. It is a very narrow amendment that says, "The Congress shall have power to prohibit the physical desecration of the flag of the United States," not the States. So Senators concerned about the multiplicity of State laws protecting the flag need not worry about that anymore.

There would be one definition of "physical desecration" and one definition of "flag of the United States." And those definitions will be decided by the Congress of the United States, as it should be. And it will apply everywhere. And it will be a narrow definition. I have no doubt about it. It will be one that will work and one that will lend credibility to our values in our society, our values of patriotism, honor, dignity, country, family. That is what this is all about.

This is a chance to have that debate on values, honor, dignity, family, country, yes, patriotism. I think that this amendment is worth it alone. I really do.

And those definitions that would be set by Congress would need the President's signature as well because it would be a statute. And either the President will sign it, or veto it if he did not like it. So you have all these checks and balances. Let us trust the people on this matter.

The American Legion and the Citizen's Flag Alliance reluctantly support this compromise. We have gone more than halfway, and I ask the opponents of the amendment to accept this compromise. Let us at least protect the flag at the Federal level. We can do it narrowly and do it fairly and do it in the right manner.

I am just going to say one or two more words about the amendment. It amazes me that people come on this floor and say, "It's terrible what they're doing to our flag. We should not allow people to smear excrement on it and put epithets and obscenities on it, and we shouldn't allow them to burn it and trample on it, and it is so terrible," but they are unwilling to do anything about stopping it.

Some had the temerity to say that "Well, we don't have that many flag burnings and that many flag desecrations." Well, I submit we do, because every flag desecration that occurs—and we have had them every year—every one that occurs is covered by the press and goes out to millions of people in this country, every last one. And, frankly, it affects everybody in this country every time we see this kind of heinous conduct.

It is time for us to quit using these phony arguments and stand up and vote to honor our national symbol by merely giving Congress the power to honor it, if it so chooses, with the right of the President to veto whatever they do, if he or she so chooses.

Mr. President, I think we debated this enough today.

MORNING BUSINESS

Mr. HATCH. I now ask unanimous consent that there now be a period for the transaction of routine morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE ROLE OF GOVERNMENT

Mr. PELL. Mr. President, I once more express reservations about the premise upon which we are proceeding in attempting to balance the budget in 7 years. I am mindful that both my party and the President have agreed to undertake this herculean task of reaching an accord where the difference between what the President has proposed and what the congressional majority seeks is pegged at some \$730 billion in entitlement savings, discretionary spending levels, and tax cuts. While I fully support their determination to curb deficit spending, I remain skeptical of the specific objective they have set.

With due respect for the Democratic leadership, I must express my continuing discomfort with the view that it is imperative that the Federal budget be balanced by a date certain. I have always believed, and continue to believe, that the Federal budget is not supposed to be in perpetual balance, but that as John Maynard Keynes wisely noted, it should remain a flexible instrument of national economic policy, registering a surplus in good times and engaging in stimulative spending in bad times. To insist on a balanced budget means requiring tax rates to be increased during a recession and outlays for such programs as help for the unemployed to be decreased. This is not a palatable solution, and it is one with which most economists would find fault.

My views, I realize, are not widely held. Hence, I was most heartened to read the words of Robert Eisner, professor emeritus at Northwestern University and a past president of the American Economic Association in the *Wall Street Journal* of November 28. In

an article entitled "The Deficit Is Budget Battle's Red Herring," Professor Eisner states, and I most strongly concur, that balancing the budget is a "brief armistice in a much larger war." What we are really engaged in is a fundamental disagreement about the role of Government in our lives.

The real objective of the so-called revolution is the effective dismantlement of progressive government as we have come to know and benefit from for half a century. Federal spending on health care for the elderly, the poor, and the disabled is being drastically reduced. Cutbacks are contemplated in our investment in education, the environment, the arts and sciences, and foreign relations. These cuts typify the great differences in priorities and values which distinguish the opponents from the proponents of progressive government. And all of this occurs while we focus on that red herring, the balanced budget.

Professor Eisner accepts the premise that government should provide activities and services that the private economy would not provide or would not provide adequately. And he recognizes that many of us believe that the programs developed over the last 50 years are "indispensable both to stable economic growth and the social compact on which our economic system and our society depend."

Mr. President, I ask unanimous consent that the text of Professor Eisner's article be reprinted in the *RECORD*.

There being no objection, the article was ordered to be printed in the *RECORD*, as follows:

THE DEFICIT IS BUDGET BATTLE'S RED HERRING

(By Robert Eisner)

The agreement reached between President Clinton and congressional Republicans to try to "balance the budget" by uncertain measures in seven years is a brief armistice in a much larger war. The war has very little to do with budget deficits. What really concerns combatants on all sides—and should concern the American people—is the role of government in our economy and in our lives.

The "balanced budget" slogan is thought to ring very well with voters, so well that virtually all politicians find it obligatory to say that they, too, are committed to it. In fact, it is not clear that the ring is very loud; it is quickly drowned out by the suggestions that achieving balance might entail cutting health care and education or, generally, eliminating programs from which our citizenry think they benefit. Even less popular is an obvious solution for deficits—raising taxes. Last year's deficit, already down to \$164 billion from the \$290 billion of three years earlier, would have been wiped out completely with 12% more in federal receipts. The transparency of Washington's alleged concern for budget balancing is revealed by the various proposals for tax cuts that in themselves only increase deficits.

The current argument is not about balancing the budget now or even in seven years. It's about what to do to be able to make a forecast that the budget will be "balanced" in 2002. In January 1993, as the Bush administration was coming to a close, its Office of Management and Budget forecast for that fiscal year—already three months along—a deficit of \$327 billion. That estimate

turned out to be \$72 billion in excess of the actual deficit of \$255 billion. So who can honestly predict now what tax revenues and outlays will be in seven years?

The Congressional Budget Office projects 2.4% annual growth in real gross domestic product and 3.2% inflation. The Clinton administration's Office of Management and Budget projects 0.1 to 0.2 percentage point more growth and 0.1 percentage point less inflation, and those differences would so affect revenues and outlays as to reduce accumulated deficits by almost \$500 billion in seven years, and more than double that amount in 10 years. By 2005, these flight differences in projections would amount to half of the CBO-projected deficit. That suggests that raising the OMB projected growth less than 0.2 percentage point and lowering the projected inflation rate 0.1 percentage point more would project a balanced budget by 2005 without any cuts in government programs.

Newt Gingrich insists that the budget projections must be based on "honest scoring," implying somehow that Bill Clinton's OMB is dishonest. But who is to say which projections are correct? Many private forecasters are more optimistic, and an increasing number of economists—and this newspaper's editor—even suggest that considerably higher growth is feasible. Even a modest 0.5 percentage point more, to 3% a year, would wipe out the deficit well within seven years.

But Sen. Phil Gramm gave away the game when he argued on "Face the Nation" recently that a balanced budget that would permit more government spending was unacceptable. No deficit projections, accurate or inaccurate, should be used as an excuse to avoid essential cuts in projected government outlays.

And that is the real issue—not deficits and debt but the role of government. Conservative economists arguing for a balanced budget have long made clear that it is not deficits in themselves that concern them but the fact that, given public aversion to taxes, preventing deficits would hold down government spending. Voters would not permit increased spending if it had to be financed by taxes rather than painless borrowing.

Of course, these conservative economists are right in recognizing that deficits and an essentially domestically held public debt such as ours are not a concern. As Abraham Lincoln said in his 1864 Annual Message to Congress: "The great advantage of citizens being creditors as well as debtors with relation to the public debt, is obvious. Men can readily perceive that they cannot be much oppressed by a debt which they owe themselves."

One thing a balanced budget would do is eliminate efforts by the government to maintain private purchasing power. Such efforts would entail cutting tax rates, or at least leaving them unchanged, and raising government benefits, or at least allowing them to grow in the face of business downturns. Insisting on a balanced budget means requiring tax rates to be increased during a recession and outlays of unemployment benefits and food stamps, for example, to be decreased. Aside from the misery that some of these actions might entail, they would appear to most economists as exactly the wrong thing to do.

Government should provide activities and services that the private economy would not provide or would not provide adequately. Much of social insurance is in this category—retirement benefits and medical care for the aged, unemployment benefits for the jobless and "welfare" payments for those unable to work and their children. It is perhaps not widely acknowledged, for reasons for electoral politics, that the privatization that conservatives generally favor would extend to Social Security.